

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SCOTT ALAN FREEBURG,

Petitioner,

v.

SANDRA CARTER,

Respondent

CASE NO. C05-2014-JLR-MJB

REPORT & RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Scott Freeburg is a state prisoner who is currently incarcerated at the Clallam Bay Corrections Center in Clallam Bay, Washington. He seeks relief under 28 U.S.C. § 2254 from his King County Superior Court convictions on charges of burglary in the first degree, assault in the second degree, and murder in the first degree. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a reply to respondent's answer. The briefing is now complete and this matter is ripe for review. Following careful consideration of the record, this Court concludes that petitioner's § 2254 petition should be denied and that petitioner's petition, and this action, should be dismissed with prejudice.

REPORT AND RECOMMENDATION

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FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals, on direct appeal of petitioner's conviction, described the facts of petitioner's crime as follows¹:

In the early morning hours of November 17, 1994, Freeburg entered the apartment shared by Jose Rodriguez and his girlfriend, Darlene Martinez, and shot and killed Rodriguez.

According to Martinez, she and Rodriguez were in bed when they heard someone pounding on the door. Rodriguez got out of bed. Martinez got up and followed him. Freeburg was at the door. He told Rodriguez that he had come to collect money owed to him by Martine Gomez who had lived at the apartment a few months earlier. Rodriguez told Freeburg he knew nothing of the debt but Freeburg demanded to come in and telephone Gomez.

Rodriguez and Martinez tried to prevent Freeburg from coming into the apartment. He forced his way in, brandishing a gun. When Martinez tried to call the police, Freeburg grabbed her, threw her on the couch, pointed the gun at her head, and told her to shut up or he would kill her. At this point, Rodriguez struck Freeburg on the head with an unknown object. While Freeburg and Rodriguez wrestled, Martinez headed for the door. As she was fleeing, Martinez heard one gunshot followed by a second one. She looked back and saw Rodriguez's body go limp.

Freeburg then opened the door and Martinez saw Freeburg's friend Lawrence Kuhn in the hall holding a gun. Freeburg told Kuhn to shoot Martinez if she moved. Freeburg went into the bedroom to look for money. Martinez rushed at Kuhn, knocked him into the wall and ran out of the apartment. Kuhn fired a shot at her, but missed. Freeburg and Kuhn then fled. Martinez banged on the door of another apartment. The occupant let Martinez in and they called 911. When they returned to

¹ Petitioner was originally tried and convicted in 1998, but that conviction was reversed by the Court of Appeals and the case was remanded for a new trial. *See State v. Freeburg*, 105 Wn. App. 492 (2001) This recitation of facts was set forth in the Court of Appeals' decision on petitioner's second direct appeal.

The Court notes that petitioner, in his response to respondent's answer, challenges the accuracy of some of the facts recited by the Court of Appeals. (*See* Dkt. No. 20 at 10.) While this Court concurs that there is at least one potential inaccuracy contained in the Court of Appeals' footnote four, none of the challenged facts affect this Court's resolution of the issues presented to it for review.

REPORT AND RECOMMENDATION

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1 Martinez's apartment, Rodriguez was nearly dead on the couch. Rodriguez later died
2 from the second gunshot, which entered through the back of his neck.

3 Jeanette Stuker, who was with Freeburg and Kuhn on the night of the murder,
4 was waiting in Freeburg's truck while he and Kuhn went into Rodriguez's apartment.
5 Stuker testified that she had taken drugs that evening and was in and out of
6 consciousness while she waited in the truck. She woke up when she heard screaming
7 and the sound of two gun shots. According to Stuker, when Freeburg and Kuhn
8 returned, Freeburg was bleeding. While they were driving away, Freeburg told Stuker
9 that the guy in the apartment hit him with a lamp and Freeburg shot him. She asked
10 Freeburg if the guy he shot was dead and Freeburg said he didn't think so, because he
11 shot him in the stomach. Freeburg then said something to Stuker to the effect that he
12 needed to leave the country.

13 Freda Kuhn testified that a day or two before the shooting, Freeburg and her
14 nephew, Larry Kuhn visited her.² She said that during that visit, Freeburg and Kuhn
15 told her they were planning to steal money from a Mexican who had a large sum of
16 money. They also said they planned to steal drugs from him because he was selling
17 drugs to children.

18 At trial, Freeburg admitted he shot Rodriguez, but claimed it was self defense.³
19 He denied there was a plan to rob Rodriguez. According to Freeburg, he and Kuhn
20 went to see Rodriguez about an automobile trade. Rodriguez invited them into the
21 apartment. Kuhn and Rodriguez argued about money and drugs. The argument
22 escalated into a fight and Freeburg separated the two men. Freeburg said that as he
23 turned towards Kuhn, Rodriguez hit him in the back of the head with an unknown
24 object, knocking him to his knees. Freeburg looked up, saw Rodriguez pointing a gun
25 at him at close range, and rushed at Rodriguez. As the two wrestled, the gun fired
26 once, and Freeburg then got control of it. Rodriguez kned Freeburg and grabbed his
crotch. Freeburg testified that he fired the gun without looking or thinking and
Rodriguez fell to the couch.⁴ Kuhn grabbed the gun, and he and Freeburg left in
Freeburg's truck.

21 ² [Court of Appeals' footnote 2] Freda Kuhn testified at the first trial in 1998. Because she
22 was in a nursing home and not competent in the second trial, the transcript of her testimony was
23 read to the jury.

24 ³ [Court of Appeals' footnote 3] Freeburg testified at the first trial. In the second trial in
25 2002, his videotaped testimony from the first trial was played to the jury.

26 ⁴ [Court of Appeals' footnote 4] Freeburg's account of the shooting was undermined by the
testimony of his medical expert who described the fatal shot to the back of Rodriguez's neck as
"well-placed" and indicative of the shooter having "good control over the victim." 17RP 3027.

1 The day after the shooting, Freeburg went to work to arrange to have a co-
2 worker deposit his paycheck.⁵ He spent the next four days traveling in northwest
3 Washington. On the fifth day, Freeburg signed on as a crew member for a boat sailing
4 to Mexico. Six months later, he sailed from Mexico to Canada. In Canada he assumed
a false identity, carried false identification, and changed his appearance. In February
1997, he was arrested by Canadian authorities.

5 The State originally charged Freeburg with one count of first degree murder
6 with a firearm. The State later added one count of first degree burglary with a firearm
7 and one count of second degree assault with a firearm. Freeburg was convicted on all
8 three counts and he appealed. This court reversed and remanded for a new trial on the
9 ground that it was prejudicial error to admit evidence that Freeburg possessed a
10 weapon when he was arrested in Canada.⁶ Following the second trial in March 2002,
Freeburg was again convicted on all three counts. The trial court found he is a
persistent offender and sentenced him to life in prison without the possibility of parole.
Freeburg appeals.

11 (Dkt. No. 11, Ex. 22 at 2-5.)

12 Petitioner, through counsel, appealed his conviction and sentence to the Washington Court of
13 Appeals. (*See id.*, Exs. 18 and 20.) On February 17, 2004, the Court of Appeals issued an opinion in
14 which it affirmed petitioner's convictions, but reversed and remanded the case for re-sentencing. (*Id.*,
15 Ex. 22.) Petitioner filed a motion for reconsideration which was denied on February 5, 2004. (*Id.*,
16 Exs. 23 and 24.)

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18 Petitioner next filed a petition for review in the Washington Supreme Court. Petitioner,
19 through counsel, presented the following eight issues to the Supreme Court for review: (1) petitioner's
20 right to a fair trial was violated when deliberating jurors were subject to improper influences; (2)
21 petitioner's right to a fair trial was violated when the trial court denied a jury request for access to
22 videotape of petitioner's prior testimony; (3) petitioner's rights under the Confrontation Clause were
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24 ⁵ [Court of Appeals' footnote 5] He never returned to his workplace and never accessed his
25 bank account.

26 ⁶ [Court of Appeals' footnote 6] *Freeburg*, 105 Wn. App. at 492.

1 violated when the trial court erred in admitted Larry Kuhn's hearsay statement; (4) petitioner's rights
2 under the Confrontation Clause were violated when the trial court limited the scope of cross-
3 examination of the complaining witness; (5) petitioner's right to a fair trial was violated when the
4 prosecutor made improper comments; (6) petitioner's right to a fair and impartial judge was violated;
5 (7) petitioner's right to a fair trial was violated when the prosecutor failed to disclose agreements with
6 State witnesses; and, (8) petitioner's right to a fair trial was violated when the State failed to preserve
7 exculpatory evidence. (Dkt. No. 11, Ex. 26 at 1-3.) On November 3, 2004, the Washington Supreme
8 Court denied petitioner's petition for review without comment. (*Id.*, Ex. 28.)

9
10 Petitioner's case was thereafter remanded to the King County Superior Court for re-
11 sentencing. On February 17, 2005, petitioner was sentenced to a term of 471 months confinement,
12 which included a 60-month term for deadly weapon enhancements. (*Id.*, Ex. 1.) Petitioner appealed
13 his new sentence to the Washington Court of Appeals. (*See id.*, Ex. 30.) On August 14, 2006, the
14 Court of Appeals issued an unpublished opinion in which it rejected most of petitioner's arguments,
15 but concluded that the sentencing court did improperly impose deadly weapons enhancements totaling
16 60 months. (*Id.*, Ex. 34.) The Court of Appeals therefore once again remanded the matter to the
17 King County Superior Court for re-sentencing. (*Id.*)

18
19 While petitioner's appeal from his February 2005 sentencing was pending, petitioner filed a
20 personal restraint petition in the Washington Court of Appeals. (*Id.*, Ex. 35.) The Court of Appeals
21 construed the petition as presenting the following challenges to petitioner's convictions: (1)
22 petitioner's trial counsel was ineffective; (2) the charging document was defective; and, (3) the trial
23 court's comments about the special verdict form improperly influenced the jury's verdict. (*Id.*, Ex.
24 36.) On December 16, 2005, the Acting Chief Judge of the Court of Appeals dismissed the petition on
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1 waived any objection to the admission of the non-testimonial statement of Lawrence Kuhn because the
2 defense failed to object to its admission at trial. (Dkt. No. 8 at 16.) Finally, respondent argues that
3 even if petitioner's fourth ground for relief is not barred from review, there was no Confrontation
4 Clause violation. (*Id.*)

5 Standard of Review

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7 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be
8 granted with respect to any claim adjudicated on the merits in state court only if the state court's
9 decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal law,
10 as determined by the Supreme Court, or if the decision was based on an unreasonable determination of
11 the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).

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13 Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court
14 arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the
15 state court decides a case differently than the Supreme Court has on a set of materially
16 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable
17 application" clause, a federal habeas court may grant the writ only if the state court identifies the
18 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that
19 principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state
20 court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v.*
21 *Andrade*, 538 U.S. 63, 69 (2003).

22 Failure to Disclose Exculpatory Evidence

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24 Petitioner asserts in his first ground for federal habeas relief that the prosecution violated his
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1 rights to due process and to a fair trial when it failed to disclose deals and agreements made with
2 prosecution witnesses Jeanette Stuker and Darlene Martinez. (Dkt. No. 1 at 5.)

3 The Constitution requires that the prosecution disclose to an accused all evidence that is "both
4 favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473
5 U.S. 667, 674 (1985) (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)). The duty to disclose
6 encompasses both exculpatory evidence and impeachment evidence. *Strickler v. Greene*, 527 U.S.
7 263, 280 (1999) (citing *Bagley*, 473 U.S. at 676). Evidence is material "if there is a reasonable
8 probability that, had the evidence been disclosed to the defense, the result of the proceeding would
9 have been different." *Kyles v. Whitely*, 514 U.S. 419, 433-34 (1995) (citing *Bagley*, 473 U.S. at 682).
10 A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Kyles* ,
11 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 678).
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13 On direct appeal, petitioner argued that he was denied his right to due process when the
14 prosecutor failed to disclose "deals" made with Jeanette Stuker and Darlene Martinez, as such
15 evidence could have been used to impeach the testimony of these witnesses. (Dkt. No. 11, Ex. 20 at
16 19.) The Washington Court of Appeals rejected this claim because the record contained no evidence
17 that any deals had been offered to Stuker or Martinez in exchange for their testimony.
18 (Id., Ex. 22 at 27.)
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20 Petitioner, in these proceedings, continues to insist that the prosecution made deals with
21 Stuker and Martinez. Petitioner notes that both Stuker and Martinez had outstanding arrest warrants
22 in unrelated criminal matters during the pendency of petitioner's case, and yet neither was arrested.
23 Petitioner also makes reference to Martinez's cooperation in a prior unrelated criminal case which
24 spared her jail time, and to her proven lack of veracity in other matters. Petitioner suggests that these
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1 factors evidence, at the very least, unspoken deals offered by the police and prosecutors to these
2 witnesses. This Court disagrees.

3 On direct examination, both witnesses denied that any promises or threats had been made to
4 them in exchange for their cooperation or testimony. (*See* Dkt. No. 11, Ex. 6 at 2151; Ex. 7 at 2346-
5 48.) Petitioner's counsel was able to explore the witnesses' subjective motivations for testifying
6 through cross-examination. (*See id.*, Ex. 6 at 2146-51; Ex. 7 at 2387-93.) However, none of the
7 testimony elicited by petitioner's counsel on this topic substantiated that any deals had been made with
8 these witnesses and petitioner provides no independent evidence of any such deals. The Court of
9 Appeals reasonably concluded that there was no evidence of any deals. And, in the absence of such
10 evidence, petitioner's *Brady* claim must fail simply because there was no apparent agreement to
11 disclose. Accordingly, petitioner's federal habeas petition should be denied with respect to his first
12 ground for relief.
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15 Failure to Preserve Evidence

16 Petitioner asserts in his second ground for relief that the prosecution violated his right to due
17 process when it failed to preserve critical exculpatory evidence. (Dkt. No. 1 at 5.) Specifically,
18 petitioner cites to a ring belonging to the victim, a CO2 gun which was found in the victim's apartment
19 but subsequently "vanished" from police custody, a tape of the initial interview of witness Jeanette
20 Stuker, and a car title bearing defendant Stuker's signature. (*Id.*)
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22 As noted above, a criminal defendant has a constitutionally protected right to request and
23 obtain from the prosecution evidence which is material to the guilt of that individual. *See California*
24 *v. Trombetta*, 467 U.S. 479, 485 (1984) (citing *Brady*, 373 U.S. at 87.) In *Trombetta*, the United
25 States Supreme Court stated, with respect to the preservation of evidence, "[w]hatever duty the
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1 Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that
2 might be expected to play a significant role in the suspect's defense. To meet the standard of
3 constitutional materiality, evidence must both possess an exculpatory value that was apparent before
4 the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain
5 comparable evidence by other reasonably available means." *Trombetta*, 467 U.S. at 488-89 (footnote
6 and citations omitted). In *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988), the Supreme Court held
7 that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve
8 potentially useful evidence does not constitute a denial of due process of law."

10 On direct appeal, petitioner argued that he was denied exculpatory evidence by the prosecutor
11 despite an order by the trial court that all such evidence be produced. (See dkt. No. 11, Ex. 20 at 22-
12 26.) At issue are items that either were never taken into evidence by police, or were not retained by
13 police. The Court of Appeals rejected the claim, explaining as follows:

15 Freeburg argues the State violated this order by failing to disclose a CO2 gun
16 found in Rodriguez's apartment after the shooting. He argues that the CO2 gun could
17 have been the object Rodriguez used to hit Freeburg when the two were fighting.
18 Detective O'Keefe testified that he examined the gun at the crime scene and, because
19 he did not find any hair or blood on it, did not take it into evidence. O'Keefe also
20 testified that he searched the apartment and did not find any hard, sharp objects with
21 blood or hair on them, but if he had found such objects, he would have taken them into
22 evidence. Because it does not appear from the record that the CO2 gun was
23 exculpatory evidence, the State did not violate its duty to disclose exculpatory evidence
24 or deny Freeburg his right to present a defense.

21 Freeburg next argues about a ring that belonged to Rodriguez. Detective Gebo
22 testified that Rodriguez's ring could have caused the cut on Freeburg but that he
23 examined the ring with a magnifying glass and found no blood on it. He did not send
24 the ring to the lab for testing, and instead released it to Martinez. Freeburg argues that,
25 without the ring, he could not prove Rodriguez hit him and cut him with a weapon
26 instead of with the ring. But any error in not preserving the ring for testing was
harmless in light of Gebo's testimony that he saw no blood or hair on the ring when he
examined it under a magnifying glass.

1 Next, Freeburg argues the State destroyed evidence about car trading activities.
2 But his written argument suggests that defense counsel, not the State, knew about this
3 evidence. Also, there is nothing in the record to substantiate Freeburg's assertion that
4 the investigating officers destroyed the title to a car owned by Stuker.

(Dkt. No. 11, Ex. 22 at 28-29.)

5 Petitioner makes no showing in these proceedings that the failure of the state to secure and
6 preserve evidence violated his due process rights. As to the gun and the ring, petitioner fails to satisfy
7 this Court that those pieces of evidence had any apparent exculpatory value. Moreover, petitioner
8 provides absolutely no evidence that law enforcement acted in bad faith in failing to preserve for trial
9 any of the pieces of evidence cited by petitioner in his petition. In the absence of such evidence, this
10 Court must conclude that the decision of the Court of Appeals was both reasonable and consistent
11 with federal law. Accordingly, petitioner's federal habeas petition should be denied with respect to his
12 second ground for relief.

Prosecutorial Misconduct

15 Petitioner asserts in his third ground for federal habeas relief that the prosecutor violated his
16 right to a fair trial when he knowingly provided false testimony and vouched for the truthfulness of
17 witnesses Darlene Martinez and Jeanette Stuker. (Dkt. No. 1 at 6.) Petitioner also alleges that the
18 prosecution improperly commented on his right to remain silent. (*Id.*) Finally, petitioner appears to
19 contend that the prosecutor lied in a written statement presented to the trial court which stated that
20 petitioner had committed two murders in Canada. (*Id.*) While respondent argues that many of
21 petitioner's prosecutorial misconduct claims are unexhausted, the Court need not address the
22 exhaustion argument as this Court concludes that none of petitioner's prosecutorial misconduct claims
23 has merit. *See* § 28 U.S.C. § 2254(b)(2).

1 **1. Knowing Use of Perjured Testimony**

2 It is well established that a conviction may not stand under the Fourteenth Amendment when a
3 prosecutor either knowingly solicits false evidence or "although not soliciting false evidence, allows it
4 to go uncorrected when it appears." *Napue v. Illinois*, 360 U.S. 264, 269 (1950). Petitioner,
5 however, makes no showing whatsoever that the prosecutor knowingly solicited any false testimony
6 during the course of petitioner's trial. The fact that Darlene Martinez admitted during her testimony
7 that she had lied to authorities in the past (*see* Dkt. No.11, Ex. 6 at 2104-09) does not suffice to
8 establish that she testified falsely in this instance, or that the prosecutor knowingly solicited any false
9 testimony. Likewise, the fact that the defense was able to produce at trial chronological notes
10 maintained by the Washington Community Corrections Office indicating that Jeannette Stuker had told
11 a Community Corrections Officer at some point that she was involved in a murder investigation and
12 may get a plea bargain for her cooperation (*see id.*, Ex. 12 at 3279-81) does not establish that Stuker
13 testified falsely when she testified that she had not, *in fact*, received any deals from the State in
14 exchange for her cooperation. Accordingly, petitioner's federal habeas petition should be denied with
15 respect to this claim.

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18 **2. Vouching**

19 The Ninth Circuit has identified two situations in which improper vouching typically occurs:
20 (1) the prosecutor places the prestige of the government behind a witness by expressing his personal
21 belief in the veracity of the witness, or (2) the prosecutor indicates that information not presented to
22 the jury supports a witness's testimony. *United States v. Hermanek*, 289 F.3d 1076, 1098 (9th Cir.
23 2002) (citing *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998)). Improper vouching also
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1 occurs when a prosecutor implicitly vouches for a witness's credibility. *Hermanek*, 289 F.3d at 1098
2 (citing *United States v. McKoy*, 771 F.2d 1207, 1211 (9th Cir. 1985)).

3 Petitioner appears to contend that the prosecutor improperly vouched for the credibility of
4 Darlene Martinez merely by presenting her testimony at trial because he was aware that Martinez had
5 previously lied to authorities. Petitioner, however, offers no authority for the proposition that the
6 mere presentation of a witness constitutes improper vouching. And, as correctly asserted by
7 respondent, petitioner fails to identify where in the record the prosecutor either implicitly or expressly
8 vouched for the credibility of Martinez, or suggested in any way that Martinez's testimony was
9 supported by information not presented to the jury. Accordingly, petitioner's federal habeas petition
10 should be denied with respect to this claim as well.

11 **3. Right to Remain Silent**

12 In *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the United States Supreme Court held that the
13 "use for impeachment purposes of [a defendant's silence] at the time of arrest and after receiving
14 *Miranda* warnings, violate[s] the Due Process Clause of the Fourteenth Amendment" because the
15 warnings imply that the defendant will not be penalized for his silence. However, a defendant's pre-
16 arrest or pre-*Miranda* silence may be used for impeachment purposes without violating the federal
17 constitution. See *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (citations omitted). In addition,
18 if a defendant gives a statement after receiving *Miranda* warnings, and that statement is arguably
19 inconsistent with his trial court testimony, the prosecutor may inquire into the prior inconsistent
20 statements during cross-examination of the defendant. See *Anderson v. Charles*, 447 U.S. 404, 408-
21 09 (1980).

1 On direct appeal, petitioner argued that the prosecutor impermissibly commented on his right
 2 to remain silent during closing arguments. (Dkt. No. 11, Ex. 18 at 29-33.) The Court of Appeals
 3 rejected that claim, explaining its decision as follows:

4 Freeburg testified that two days after the shooting, his landlord told him that
 5 Sergeant Gebo was trying to contact him. The landlord gave Freeburg Gebo's card
 6 and told Freeburg that Gebo would not be back at work until Monday. When asked
 7 whether he ever called Gebo, Freeburg answered: "I wanted to, but, no, I did not."⁷
 8 Freeburg's testimony on cross examination was to the same effect, namely, that he
 9 knew Gebo was trying to get [sic] reach him, but that Freeburg never contacted him.
 10 Freeburg also testified that he likewise did not call anybody else at the Seattle Police
 11 Department and that, instead of calling Gebo on Monday, he left and sailed to Mexico.

12 During closing argument, Freeburg argued his testimony and version of the
 13 events was more credible than the State's evidence. In rebuttal, the State argued that
 14 the evidence did not support Freeburg's description of what happened in part because
 15 of the choices Freeburg had made. The prosecutor argued:

16 Let's talk about the Defendant's choices very briefly. He chose to be
 17 with Jeanette Stuker that night. The heroin addict hooker, and now he
 18 complains, well, she's not really very reliable.

19 The Defendant chose to go to Darlene and Jose's apartment at one
 20 o'clock in the morning, and now he sort of complains that those are sort of
 21 shady people, with some kind of past, particularly Jose, the fact that he's an
 22 illegal or has other names. I have no idea what bearing that has on this case,
 23 other than it's [sic] sort of gratuitously kind of kicks him around it, and maybe
 24 you'll care less about him as a result. I don't know what it has to do with this
 25 case.

26 The Defendant chose to take the weapon from the apartment, and now
 want you folks to speculate about that weapon being somehow in the hands of
 the victim at some earlier point in time. And that was a choice he made.

The Defendant chose not to talk to the police. But he wants you to
 believe that he had this great story to tell.

[DEFENSE COUNSEL]: Your Honor, I would object. It's
 commenting on the Defendant's right to remain silent.

[THE COURT]: Overruled. You may continue your argument.
 Objection noted.

[PROSECUTOR]: He wants you to speculate about this great story
 that he had to tell, even though he fled. And it's interesting isn't it? Because

⁷ [Court of Appeals' footnote 77] RP 03/25/02 at 65.

1 what got left? Business cards, over at all these different places. Business cards.
2 And the Defendant says, I was too afraid to talk to anybody.

3 Well, before you hop on a boat and go to Mexico, you know, you can
4 for a whole quarter, you can sit there and say, Detective Gebo, you know, this
5 [sic] Scott Freeburg. And I'm not going to tell you where I am right now, but I
6 got a story to tell you. And I'm afraid you won't believe it, but I'm going to
7 tell you anyway. Let me tell you what really happened that night. No. And do
8 you know why? Because this was his state of mind. He hadn't cooked the
9 story up yet. He was still stuck in the, oh, I made a terrible mistake –

10 [DEFENSE COUNSEL]: Your Honor, I'm going to raise the
11 objection. It's commenting on the Defendant's right to remain silent.

12 [THE COURT]: Right. Objection noted. It's overruled. You may
13 continue argument.

14 [PROSECUTOR]: This is his state of mind. He's still stuck on the, I
15 really did a bad thing. Honey, don't hate me. It couldn't be more clear.

16 What other choices did he make? He made the choice to lie to his
17 girlfriend about his wound, and remained silent about this event, even though he
18 knew she'd learn the truth. And he made the decision to flee the country for
19 the better part of three years. But he wants you to speculate again about this
20 great story that he had to tell all along.

21 There's only one witness in this case that meaningfully, meaningfully,
22 supports a claim of self-defense, and that's the Defendant. And that's a witness
23 that's not worthy of belief. That's why the State put his testimony from '99 –
24 1998 before you. It's important that you heard the version that he came up
25 with then, and we wanted you to hear that.

26 His claim of self-defense is betrayed by his words. It's betrayed by his
deeds. And it's betrayed by his own silence.

[DEFENSE COUNSEL]: Objection, Your Honor. The Defendant has
the right to remain silent.

[THE COURT]: Yes. And the jury has been so instructed.

...

[THE COURT]: Objection's overruled. You may continue argument.⁸

On appeal, Freeburg contends that the prosecutor's argument was an
impermissible comment on his right to remain silent. A prosecutor may not make an
argument relating to a defendant's silence in order to infer guilt from such silence.⁹

⁸ [Court of Appeals' footnote 78] 20RP 3678-81.

⁹ [Court of Appeals' footnote 79] *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285
(1996).

1 Included in this prohibition is the use of the defendant's prearrest silence to infer guilt.¹⁰
 2 But, "the Fifth Amendment is not violated when a defendant who testifies in his own
 3 defense is impeached with his prior silence."¹¹

4 [I]mpeachment follows the defendant's own decision to cast aside his cloak of
 5 silence and advances the truth-finding function of the criminal trial. We
 6 conclude that the Fifth Amendment is not violated by the use of prearrest
 7 silence to impeach a criminal defendant's credibility.¹²

8 Freeburg's testimony was essential to his defense of self defense and his closing
 9 argument. The State's rebuttal argument related to Freeburg's failure to contact
 10 Detective Gebo was used to impeach his testimony and respond to his defense. The
 11 prosecutor's comments were not an improper comment on Freeburg's right to remain
 12 silent.

13 (Dkt. No. 11, Ex. 22 at 23-25.)

14 Petitioner offers nothing in these proceedings to demonstrate that the decision of the
 15 Washington Court of Appeals was either contrary to, or constituted an unreasonable application of,
 16 federal law. The record supports the conclusion that the prosecutor's comments regarding
 17 petitioner's silence were not impermissible comments on petitioner's right to remain silence because
 18 the comments related to, and arose out of, efforts of the prosecutor to impeach petitioner's own
 19 testimony. Accordingly, petitioner's federal habeas petition should be denied with respect to this
 20 portion of his prosecutorial misconduct claim.¹³

21 ¹⁰ [Court of Appeals' footnote 80] *Id.*, 130 Wn.2d at 243.

22 ¹¹ [Court of Appeals' footnote 81] *Jenkins v. Anderson*, 447 U.S. 231, 235, 100 S.Ct.
 23 2124, 65 L.Ed.2d 86 (1980).

24 ¹² [Court of Appeals' footnote 82] *Id.*, 447 U.S. at 238.

25 ¹³ Petitioner appears to indicate in his response to respondent's answer that he believes his
 26 claim involving the prosecutor's use of his pre-arrest silence is moot because he agreed to have his
 earlier taped and edited trial testimony presented to the second jury. However, because it is
 unclear whether petitioner, in fact, intended to withdraw this claim, the Court has addressed the
 merits of the claim.

The final prosecutorial misconduct claim asserted by petitioner in his federal habeas petition is a claim that the prosecutor knowingly lied in a written statement to the trial court about petitioner having committed two murders in Canada. Petitioner directs the Court's attention to the transcript of the first sentencing hearing following his second trial. (*See* Dkt. No. 11, Ex. 15 at 3832.) A review of the portion of the transcript cited by petitioner reveals that during petitioner's comments to the sentencing court prior to imposition of sentence, petitioner made reference to a report which was apparently submitted by a prosecutor in petitioner's first trial, in conjunction with a motion for extra security, which erroneously stated that petitioner had killed two people in Canada. (Dkt. No. 11, Ex. 15 at 3831-32.)

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1 Kuhn, which was presented at petitioner's first trial, about statements Mr. Kuhn made when he and
2 petitioner were visiting Ms. Kuhn at her apartment prior to the shooting. Ms. Kuhn's prior testimony
3 was read to the jury at petitioner's second trial. The relevant testimony was as follows:

4 Q: Okay. Do you remember on the second occasion, you, Larry, and Scott having
5 a discussion?

6 A: Yes, we talked about – I don't know, a lot of things, and then I knew they were
7 getting down to what they wanted to say or something, and the next thing I
8 heard was that they were planning to do something.

9 Q: What were they planning to do?

10 A: Well, they told me they had heard of a person who had just a [sic] received a
11 very large amount of money and also drugs, and that this guy was selling the
12 drugs to all the little children in the neighborhood and they thought they were
going out there and not only take all his money, but get the drugs away from
him, too.

13 Q: That's what Scott and Larry told you?

14 A: They were thinking about that, yeah, that they were thinking about that.

15 Q: Did they tell you where this drug dealer was from?

16 A: No, they just said he was Mexican. And I said, what part of town does he live
17 in, and they said south.

18 (Dkt. No. 11, Ex. 9 at 2736-37.)

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20 Petitioner argued on direct appeal that the trial court erred in admitting the out-of-court
21 statement of Mr. Kuhn through Ms. Kuhn's testimony under Washington Rule of Evidence ("ER")
22 801(d)(2)(v). (*See id.*, Ex. 18 at 34.) ER 801(d)(2)(v) provides that an out-of-court statement is not
23 hearsay if "[t]he statement is offered against a party and is . . . a statement by a coconspirator of a
24 party during the course and in furtherance of the conspiracy." Petitioner's contention on appeal was
25 that the trial court had admitted the statement without finding that the statement furthered the
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1 conspiracy. (Dkt. No. 11, Ex. 18 at 34.) Petitioner also argued, in his pro se brief on appeal, that the
2 trial court erred in admitting Ms. Kuhn's testimony because Ms. Kuhn was not competent to testify at
3 the first trial. (*See id.*, Ex. 20 at 5-15.) Included in petitioner's argument that Ms. Kuhn was not
4 competent to testify was a claim that the admission of Ms. Kuhn's testimony violated his rights under
5 the Confrontation Clause. (*See id.*, Ex. 20 at 13-15.)
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7 The Court of Appeals, after considering petitioner's challenge to the admission of his co-
8 conspirators's statement, concluded that petitioner had never challenged the admission of the
9 statement under ER 801(d)(2)(v) in the trial court and that he could not raise this evidentiary issue for
10 the first time on appeal. (Dkt. No. 11, Ex. 22 at 8-9, citing Washington Rule of Appellate Procedure
11 2.5(a).) The Court of Appeals also noted that "even if the argument had been presented below and the
12 court found the evidence insufficient to show that Larry Kuhn's statements were made in furtherance
13 of a conspiracy, any error in admitting the testimony would have been harmless because the statements
14 were admissible as adoptive admissions under ER 801(d)(2)(ii)." (*Id.*, Ex. 22 at 9 n. 26.) The state
15 courts did not address any Confrontation Clause claim arising out of the admission of Mr. Kuhn's
16 hearsay statement through the testimony of Ms. Kuhn.
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18 Petitioner's Confrontation Clause claim is the only claim arising out of the admission of Ms.
19 Kuhn's testimony which is before this Court for review. Respondent asserts that this claim is not
20 subject to federal habeas review because petitioner's procedurally defaulted on the claim in the state
21 courts. Respondent contends that the Court of Appeals' citation to RAP 2.5(a) in disposing of the
22 claim on direct appeal constitutes an independent and adequate ground for disposition of the case and
23 that petitioner is therefore procedurally barred from obtaining federal habeas review. Respondent
24 argues, in the alternative, that even if petitioner did not waive this claim, there was no Confrontation
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1 Clause violation. Because this Court concludes that petitioner's Confrontation Clause claim lacks
2 merit, the Court declines to address respondent's procedural bar argument.

3 The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal
4 prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."
5 U.S. Const. Amend. VI. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the United States Supreme Court
6 held that the Confrontation Clause does not bar the admission of an out-of-court statement of an
7 unavailable witness so long as the statement bears "adequate indicia of reliability." *Id.* at 66. Under
8 *Roberts*, an out-of-court statement meets the reliability test if it falls within a "firmly rooted hearsay
9 exception" or bears "particularized guarantees of trustworthiness." *Id.*

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11 In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court partially abrogated
12 *Roberts*. The Court, in *Crawford*, drew a distinction between testimonial and non-testimonial
13 hearsay, and rejected the *Roberts* test as to testimonial hearsay statements. As to testimonial hearsay
14 statements, the Court held that such statements are barred under the Confrontation Clause unless the
15 declarant is unavailable and the defendant had prior opportunity to cross-examine the declarant.
16 *Crawford*, 541 U.S. at 68-69.

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18 The first question this Court must address in evaluating petitioner's Confrontation Clause
19 claim is whether the statements at issue here were "testimonial" and therefore subject to the rule
20 announced in *Crawford*. The Supreme Court did not spell out a comprehensive definition of
21 "testimonial" in *Crawford*, but did note that "testimony . . . is typically a solemn declaration or
22 affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. The Court went
23 on to distinguish "a formal statement to government officers" from "a casual remark to an
24 acquaintance." *Id.* The Court suggested that the former type of statement constitutes testimony
25 whereas the latter does not. The Court also noted that certain statements, such as business records or
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